FACILITY PLANNING AND CONTROL, STATE OF LOUISIANA
REPAIR/REPLACEMENT OF CHARITY HOSPITAL, PW #2175
FEMA-1603-DR-LA
DOCKET # CBCA-1741-FEMA

RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO ARBITRATION REQUEST OF THE LOUISIANA FACILITY PLANNING AND CONTROL, STATE OF LOUISIANA

The Federal Emergency Management Agency ("FEMA") hereby respectfully submits its response to the Request for Arbitration of Project Worksheet Number 2175v3 and Related Matters ("Arbitration Request") made by Facility Planning and Control, State of Louisiana's ("FP&C" or "Applicant") dated September 30, 2009.

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JURISDICTION

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, P.L. 111-5, which establishes an option for arbitration under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA. See 44 C.F.R. § 206.209.

The Applicant has met the regulatory guidelines for filing an arbitration request as outlined in 44 C.F.R. § 206.209 as follows:

- Project Worksheet (PW) 2175v3 represents eligible work and all costs to repair disaster-related damage to Charity Hospital.
- The arbitration request for $491,884,000 exceeds the $500,000 arbitration project threshold.
- FEMA responded to the Applicant's first appeal on May 8, 2009.

- The Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) submitted a second appeal on August 26, 2009.
- The Applicant filed the arbitration request by letter dated September 30, 2009, with all supporting documentation.
- The Applicant has met the October 30, 2009, arbitration request submittal deadline for appeals pending from February 17, 2009.
- The Applicant withdrew its second appeal in its arbitration request letter and a separate letter dated October 14, 2009, to FEMA.

INTRODUCTION

The Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes FEMA to provide State and local governments with Federal assistance to supplement State and local efforts in responding to a disaster or emergency, when the major disaster or emergency is of such severity and magnitude that "effective response is beyond the capabilities of the State and the affected local governments." 42 U.S.C. § 5170. FEMA's Public Assistance program provides grants to eligible State, and local and tribal governments. Under the Public Assistance (PA) Program, FEMA may fund the repair, restoration, reconstruction, or replacement of a facility damaged or destroyed by a major disaster. According to FEMA's regulations, "[a] facility is considered repairable when disaster damage does not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster." 44 C.F.R. § 206.226(f).

FP&C serves as the Applicant for a Public Assistance grant from FEMA on behalf of the Board of Supervisors of Louisiana State University Agricultural and Mechanical College, which is the designated owner of Charity Hospital. The Applicant is seeking disaster assistance from FEMA

for damage caused to Charity Hospital as a result of Hurricane Katrina. The parties disagree about the amount of damage caused to Charity Hospital by Hurricane Katrina and whether Charity Hospital is eligible for repair or replacement costs.

In its Arbitration Request, the Applicant alleges that FEMA has failed to fully and adequately assess the scope of work or the costs to repair the damage to Charity Hospital and that the Agency's determinations in regards to the facility were arbitrary and capricious. The Applicant seeks to have this Panel determine: (1) the Applicant has proved through reports and analyses prepared by independent consultants the true estimate of disaster-related damage to Charity Hospital; (2) the cost to repair Charity Hospital exceeds 50 percent of the cost of replacement; and, (3) therefore, the Applicant is entitled the full replacement value of Charity Hospital, calculated to be not less than $491,884,000.

As argued more fully below, the Applicant's request for $491,884,000 must be rejected. FEMA is charged with implementing the Stafford Act and its implementing regulations and its administrative interpretation should be controlling where FEMA's determination of the eligible scope of work and damage is reasonable. Based on damage assessments that began in October 2005, FEMA estimates the cost to repair disaster-related damage to Charity Hospital to be $126,142,709. The cost to repair the disaster-related damage to Charity Hospital is less than 50 percent of the cost to build a new hospital, which FEMA estimates to be $474,750,898. Exhibit 1, Attachment B. Pursuant to FEMA regulations and program policy, Charity Hospital is repairable and does not meet the FEMA threshold for replacement.

The Applicant has failed to meet its burden to demonstrate FEMA was arbitrary and capricious. The Applicant's disagreement with FEMA's methodology is misplaced and misinformed.

Moreover, its method of calculating eligible damages is legally unsound, since it relies on estimates that include costs to repair "damage" that was not caused by Hurricane Katrina and it contains other technical and methodological errors leading to its incorrect conclusion that the costs to repair disaster-related damage to Charity Hospital reached the threshold for replacement of the hospital.

Accordingly, FEMA requests this Panel render a decision in FEMA's favor because the Applicant has failed to demonstrate that FEMA's determination with respect to the estimated cost to repair Charity Hospital for disaster-related damage ($126,142,709) is arbitrary and capricious.

STATUTORY AND LEGAL BACKGROUND

I. The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to, and recovery from, Presidentially-declared major disasters and emergencies. The authority for these duties is the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended ("Stafford Act").[1] See 42 U.S.C. §§ 5121 *et seq.*

The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. §§ 5122 and 5170; 44 C.F.R. §§ 206.36 and 206.38. Once a major disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared areas. See 42 U.S.C. § 5170.

[1] The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

II. Public Assistance Program

The PA Program allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain private non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.220 - 226. To be eligible for PA, the project or work for which the grant is sought must be: (1) a result of the declared major disaster or emergency; (2) must be located in an area designated by the President as eligible for assistance; and (3) must be the legal responsibility of the PA applicant. 44 C.F.R. § 206.223(a)(1)-(3). Also, FEMA will not provide assistance to an applicant for "damage caused by its own negligence." 44 C.F.R. § 206.223(e). Further, FEMA must determine whether the facility for which the applicant is seeking assistance is eligible for repair or replacement costs. To this end, FEMA employs what it calls "the 50 Percent Rule," which states:

> "A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster… If a damaged facility is not repairable in accordance with paragraph (d)(1) of this section, approved restorative work may include replacement of the facility. The applicant may elect to perform repairs to the facility, in lieu of replacement, if such work is in conformity with applicable standards. However, eligible costs shall be limited to the less expensive of repairs or replacement." 44 C.F.R. §§ 206.226(f)(1)-(2); see Applicant Exhibits 41 and 42.

To be reimbursed for eligible PA work, an eligible PA applicant must file a Request for Public Assistance. 44 C.F.R. § 206.202(c). The PA applicant must then submit to FEMA a Project Worksheet (PW) that includes the eligible scope of work, an estimated cost of the work, and any relevant information with respect to insurance coverage. See 44 C.F.R. § 206.202(d). In order to create a PW, a team of federal, state, and local representatives inspect the damage and record the information they gather. See 44 C.F.R. § 206.202(d). Developing a PW is typically a joint effort between FEMA and the applicant. The PW is a tool used to describe the project – that is, the scope of eligible work and estimated or actual costs necessary to complete the work. See 44 C.F.R. § 206.202(d). The PW also includes applicant identification information, description of

damage, facility location, and pre-disaster description of the facility. See PA Guide, FEMA 322 (1999) at 69-73. Every project is analyzed to determine whether the work meets the eligibility requirements of 44 C.F.R. § 206.223(a)(1)-(3). After a PW is completed, FEMA reviews it to determine whether the work is eligible and costs are fair and reasonable to determine the amount of funding to approve for eligible work. See 44 C.F.R § 206.202(d).

Large project PW estimates for work that is not complete must use the Cost Estimating Format (CEF). See Applicant Exhibit 5. The CEF for Large Projects Instructional Guide (Ver. 2) outlines the established FEMA procedure for reviewing an applicant-provided architectural/engineering (A/E) report with a construction cost estimate. Id. at 27. The established procedure includes the following six steps, each of which must be completed prior to using an applicant's A/E estimate in a FEMA CEF. Id.

1. Verify that all items of work included in the estimate are eligible.
2. Check the ten largest cost items against RS Means cost data.[2]
3. Check 20 to 30 percent of the remaining cost items at random against RS Means cost data.
4. If the line-item unit costs checked in the A&E construction cost estimate are within 10 percent of the RS Means cost data, use the A&E construction cost estimate in Part A.
5. If the line-item unit costs checked in the A&E construction cost estimate are not within 10 percent of the local average weighted unit prices or RS Means cost data, assume the entire estimate is not comparable and develop a new Part A. Care should be exercised to ensure that the scope of work used to develop the new Part A contains eligible items only.

[2] "RS Means cost data" refers to a nationally recognized database of construction costs. Comparison with RS Means cost data is necessary to verify reasonableness of cost estimates submitted by applicants.

All work items specified in the report should be listed in Part A and quantified; do not use lump sum items. Each work activity should be reviewed to determine if the estimate reflects costs that could be duplicated by factors in Parts B through H. Examples include contingencies, which could be included in the quantities that would be duplicated by Part C; overhead and profit that could be duplicated in Part D; and escalation that could be duplicated in Part E.

6. After completing Part A, enter totals in the appropriate fields at the top of the summary for uncompleted work.

As noted above, the first step in the review process is to verify that all items in the scope of work are eligible. It is FEMA's responsibility to review the eligible scope of work in accordance with the requirements of the Stafford Act, Federal regulations, and FEMA policies. Id. at 15 and 19. If FEMA cannot verify that all work identified in an applicant's A/E report is eligible or FEMA determines that the A/E report includes ineligible scope of work, the CEF Instructional Guide directs FEMA staff to revisit the scope of work before completing a cost estimate that will be used as the basis for obligating funds. Id. at 19. The procedure also requires a determination that the estimate is comparable to RS Means cost data before using the estimate in a CEF for developing the PW estimate. Id.

Once FEMA has approved a PW, FEMA may then make Federal disaster assistance funds available (*i.e.*, "obligate") based on the final PW. 44 C.F.R. § 206.202(e). In obligating funds based on an approved PW, FEMA makes Federal disaster assistance funds available to its Grantee (the State), which passes the funds to the appropriate subgrantee (the PA applicant). Id.

A PW is not a contract between FEMA and the State and/or subgrantee to pay Federal disaster assistance, nor does it confer to the applicant the right to receive any such assistance. See 44 C.F.R. § 206.202(d). A PW only provides estimates, based upon the engineering analysis and on-site investigation, of the anticipated eligible cost of a project. Id. at § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998)(providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the state. See 44 C.F.R. § 206.201(e). FP&C is a Subgrantee of the State. See 44 C.F.R. § 206.201.

III. Standard of Review

This Panel must afford considerable deference to FEMA's interpretation of the statutory scheme it has been entrusted to administer, and to its own regulations. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16-17 (1965)(explaining that the "ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation"); Hawaiian Elec. Co., Inc. v. E.P.A., 723 F.2d 1440, 1447 (9th Cir. 1984). As with judicial review under the Administrative Procedure Act (APA), this Panel must affirm FEMA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Friends of the Earth v. Hintz, 800 F.2d 822, 830-831 (9th Cir. 1986). The Agency's decision is entitled to a presumption of regularity and must be upheld as long as there is a rational basis for it. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 415; Friends of the Earth v. Hintz, 800 F.2d at 831. Under the "highly deferential" standard of APA review, this Panel, like a court, "may not

substitute [its] judgment for that of the agency" but instead must presume "the agency action to be valid and [will affirm] the agency action if a reasonable basis exists for its decision." Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1075-76 (9th Cir. 2006)(internal citations omitted).

FACTUAL BACKGROUND

I. Charity Hospital: Pre-Katrina

Charity Hospital is a state-owned facility managed by the Applicant. The Medical Center of Louisiana, New Orleans (MCLNO) and a division of the Louisiana State University Healthcare Services Division (LSUHSD) operate the Charity Campus, which includes the Charity Hospital main building. The hospital's main building is a multi-wing, 20-story building with a basement, and is located at 1532 Tulane Avenue, New Orleans, Louisiana 70112.

Prior to Hurricane Katrina, Charity Hospital was in a state of severe disrepair. In 2002 LSUHSD, the tenant agency, hired ADAMS Management Services Corporation (ADAMS) to assess conditions at the hospital and provide recommendations for repairs to address long-standing deferred maintenance issues, code violations, and other facility upgrades to improve service delivery. ADAMS produced a report titled "*Charity Hospital – Main Building Facility Conditions Analysis.*"[3] See Exhibit 2. ADAMS reported that Charity Hospital required an

[3] A number of other assessments and reports discuss the pre-disaster conditions at Charity Hospital. For example, ADAMS produced a second report in 2003 titled "Comprehensive Healthcare Facilities Study – Phase II: Medical Center of New Orleans, Charity Campus." See Exhibit 3. This later report appears to incorporate and build from the findings of the 2002 assessment. On March 28, 2006, the U.S. Government Accountability Office (GAO) issued a report titled "Hurricane Katrina: Status of the Health Care System in New Orleans and Difficult Decisions Related to Rebuild It Approximately 6 Months After Hurricane Katrina." See Exhibit 4. The GAO report documents or references many of the same pre-disaster conditions noted by ADAMS. In May 2008, RMJM Hiller completed another detailed survey of the facility. The Foundation for Historical Louisiana (FHL) commissioned the study pursuant to House Concurrent Resolution 89. After 12 weeks of "intense" assessments in 2008, the RMJM Hiller team commented that Charity Hospital has held up remarkably well over 75 years of "hurricanes, major calamities, neglect and deferred maintenance." Exhibit 5 at 4. The study concluded that repairing Charity Hospital could be done at "reasonable cost" and more expeditiously than undertaking a new building project. Id.

extensive amount of repair. Of the required repairs, the report identified $92,198,590 (or 68.5 percent of total repairs) attributable to "Deferred Maintenance."[4]

Among the extensive list of deferred maintenance of major structural and facility systems that ADAMS cited in 2002 are:

1. Exterior windows have extensive rust and are poorly sealed, which caused the HVAC to malfunction. Id. at 1.1.2.
2. Portions of roof need to be replaced and roof decks inspected due to deterioration and some leakage. Id. at 1.1.2.
3. Floors are either damaged or resist cleaning; and walls are damaged from leaky HVAC and piping. Id. at 1.1.3.
4. Air handler units (AHUs) and potable water piping need to be replaced because of sub-par functioning and out-of-code return air grills, which adversely impact air balancing and humidity levels and, consequently, HVAC systems. Id. at 1.1.9.
5. Plumbing system – including water supply and drainage – is at end of normal useful life and should be replaced. Id. at 1.1.11.
6. Electrical system is in poor condition and impacting medical operations. Id. at 1.1.10.
7. Exterior water infiltration causing toxic mold. Id. at 1.1.6.

[4]According to ADAMS, Deferred Maintenance "refers to expenditures for repairs which were not accomplished as part of normal maintenance or capital repair which have accumulated to the point that facility deterioration is evident and could impair the proper functioning of the facility. Costs estimated for deferred maintenance projects should include compliance with applicable codes even if such compliance requires expenditures beyond those essential to effect the needed repairs. Deferred maintenance projects represent catch up expenses." Exhibit 2 at 1.4.2. Deferred maintenance repairs are not eligible because they do not meet the criterion of being disaster-related. It is the applicant's responsibility to show that the damage is disaster-related. See PA Guide, FEMA 322 (1999) at 26-27.

As a result of this condition of disrepair, ADAMS concluded in 2002 that Charity Hospital required $134,518,459 of necessary repairs and estimated that the cost of these repairs equaled 52.2 percent of the hospital's replacement cost. Id. at 1.2.2.

II. Charity Hospital: Hurricane Katrina

On August 29, 2005, the President issued a major disaster declaration for the State of Louisiana (DR-1603) as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. Exhibit 6; See 42 U.S.C. § 5170. This declaration authorized all categories of Public Assistance, including restoration of damaged facilities. See Exhibit 7, paras. 4 and 5.

As a result of Hurricane Katrina, the basement of Charity Hospital was flooded to just below the first floor level and the facility suffered wind and wind-driven rain damage. Between September 7 and September 19, 2005, approximately 200 personnel from the U.S. Army, the National Guard, contractors employed by the U.S. Army Corps of Engineers, and Charity Hospital medical personnel pumped water out of the basement; cleaned and decontaminated the first three floors of Charity Hospital; removed all biodegradables from the first 14 floors; boarded up windows, restored electrical power to floors one to 19, and performed other remediation measures. See Exhibit 8 at 2-4. FEMA funded all of these emergency protective measures in an expedited manner as it was assumed Charity Hospital could be re-opened to provide critically-needed medical and emergency services care to the New Orleans area. See Exhibit 7, para. 8.

On September 19, 2005, State officials asked the U.S. Army and others assisting with the cleanup efforts at Charity Hospital to remove temporary generators that had restored power and leave the premises. See Exhibit 8 at 4-5. The State also informed FEMA of its intention to prioritize repairs to University Hospital over repairs to Charity Hospital. See Exhibit 7, para.9.

Reports from this time period indicate that the first three floors of Charity Hospital had been scrubbed clean and sanitized by the time the U.S. Army departed.[5]

III. Initial Estimates of Disaster-Related Damage

In early October 2005, FEMA began inspecting Charity Hospital to assess its disaster-related damage. At that time, the State of Louisiana had not decided which agency would represent the State as the applicant for Charity Hospital.[6] Since the State had not designated an applicant, FEMA, with the State's permission, initiated inspections and began preparing PWs based on these site inspections and damage assessments. The eventual applicant-agency could notify FEMA through GOHSEP if it found additional damage or scope of work not captured in these early PWs in accordance with FEMA's large project procedures.[7] If determined to be eligible, FEMA would prepare a version to the applicable initial PW and obligate additional funding.

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[5] Charity Hospital physician Dr. James P. Moises stated the following in sworn affidavit testimony: "The cleanup of Charity Hospital was essentially complete by September 21. I observed at that time that the first three floors were spotless. Electric power had been restored and the air conditioning was functioning. I personally took pictures at some point in late September 2005 showing the immaculate state of Charity Hospital." Dr. Moises' testimony was provided to FEMA by the Louisiana Justice Institute (LJI) in an April 16, 2009 submission captioned "Intervention by Interested Parties in Appeal of FEMA Project Worksheet Number 2175v3 by Facility Planning and Control, State of Louisiana". See Exhibit 9, Exhibit B2, para. 17. Dr. Moises gave this sworn testimony in connection with a pending class action lawsuit filed on January 17, 2009 by the LJI against the Medical Center of Louisiana at New Orleans (MCLN) and other parties in connection with the closure of Charity Hospital captioned Melvin LeBlanc et al v. Dwayne Thomas et al (Civil District Court, Parish of New Orleans, No. 08-548). See Exhibit 10. A full transcript of Dr. Moises' deposition testimony is labeled Exhibit B-1 in the "Intervention" submitted by the LJII. In addition to the testimony of Dr. Moises, U.S. Army Staff Sergeant John A. Johnson stated the following in sworn affidavit testimony: "Between September 7, and September 19, 2005, I personally witnessed and participated in the complete restoration of the first and second floors and parts of the third floor of Charity Hospital…As an example, the 21st Chemical Company, attached to the 82nd Airborne, did a complete decontamination of the entire first floor, including the emergency room and the ICU, and decontaminated the second floor and other floors as well…The team did this over several days, and on September 19 declared the tested floors ready for human habitation." See Exhibit 8 at 2-3.

[6] In late November 2005, almost three months after Katrina's landfall, FP&C filed Requests for Public Assistance (RPA) on behalf of the State of Louisiana requesting to be recognized as the applicant for permanent repairs to all State facilities damaged by Hurricanes Katrina and Rita. Exhibit 11.

[7] The Charity Hospital project is considered a large project pursuant to 44 C.F.R. § 206.205(b). PWs for large projects where work is not yet complete are approved based on a preliminary cost estimate. However, funding for large projects is based on a final accounting and reconciliation of reasonable actual eligible costs similar to the construction industry change order process. In other words, as the applicant makes eligible repairs identified in the PW, it would be reimbursed based on their actual costs. Projects can incur additional costs from conditions not known at the time of prior site inspection, such as hidden damage, or circumstances, such as work delays or cost overruns. When a scope change or additional funding is needed, it is the applicant's responsibility to request additional funding for its projects by notifying FEMA through the State. FEMA must review and approve the

FEMA's damage assessment team for Charity Hospital included FEMA staff and technical assistance contractors.[8] The FEMA team began its inspection of Charity Hospital and found interior disaster-related damage to floors one to 20 to be relatively limited. See Exhibit 12, Damage Description and Dimensions. These early site visits included all areas of the facility and the team encountered a number of damaged elements that appeared to be the result of deferred maintenance and not a result of the disaster.[9] See Exhibit 7, para. 12.

Concurrent with FEMA's initial damage assessment inspections, Charity Hospital's tenant agency (LSUHSD) retained ADAMS, an architectural firm, to assess damage at the facility. See Exhibit 7, para. 13. ADAMS had previously prepared facility conditions assessments for Charity Hospital in 2002. See Exhibits 2 and 3.

In mid-October 2005, ADAMS presented FEMA with a preview of its report and findings. FEMA expressed concern to ADAMS representatives regarding the draft report's presentation of data in summary format. Damage and scope data in summary format would not facilitate FEMA review and validation to ensure only disaster-related damage and eligible scope of work are captured. See Exhibit 7, para.14.

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additional scope of work and costs to determine eligibility. See PA Guide, FEMA 322 (1999) at 115-116. It should not be assumed that additional funds will be automatically approved at the end of the project. Id.

[8] A list of primary technical specialists assigned to assist the Applicant with Charity Hospital and their credentials is attached as Exhibit 13. The site assessment team members were extremely experienced and many of them were members of accredited professional organizations with an average of 20 years of experience. FEMA included Registered Architects; Professional Engineers; Certified Construction Managers; an HVAC Specialist; a Professional Hydro-geologist; and electrical, mechanical, geotechnical and structural engineers. In addition to being extremely well versed in the professional disciplines of architecture and engineering, some staff had specific FEMA Public Assistance experience working with medical facilities damaged by flooding, wind, and wind-driven rain. See Exhibit 7, Para.11

[9] Some rooms were locked and therefore a relatively insignificant portion of the building inaccessible.

On November 4, 2005, the Applicant submitted the ADAMS damage assessment and cost estimate to FEMA (referred to hereafter as the "ADAMS Report"). See Applicant Exhibit 11. The ADAMS Report estimated that the cost to repair disaster-related damage was $257,693,697 and the cost to replace the facility was $395,406,622. Id. Therefore, the ADAMS Report concluded that the cost to repair disaster-related damage to the facility exceeds 50 percent of the hospital's replacement cost. Id.

Following receipt of the report, FEMA conducted a thorough review of the document and noted that ADAMS did not address many of the issues identified in the mid-October preview of the draft report. Specifically, the final report, like the drafts before it, presents a summary of damage and scope of work quantities in a format that did not allow FEMA to verify the disaster-related damage and determine eligible scope of work. FEMA concluded that it could not use the ADAMS Report to reconcile damage estimates or as the basis for determining whether the hospital is eligible for replacement pursuant to FEMA Response and Recovery Directorate Policy 9524.4 (1998)[10] See Applicant Exhibits 41 and 42. On December 8, 2005, FEMA informed GOHSEP, the Applicant, and LSUHSD of its decision to reject the ADAMS report findings at a scope alignment meeting. See Exhibit 7, paras. 15 and 16.

As a result, FEMA, the State of Louisiana, Governors Office of Homeland Security and Emergency Preparedness ("GOHSEP"), and the Applicant began regular meetings to discuss development of initial PWs. FEMA proposed "scope alignment" as a process that could be followed upon completion of initial PWs to reconcile FEMA's and the Applicant's assessments of disaster-related damage and repairs. See Exhibit 7, para.19. The Applicant, FEMA, and consultants working on the Charity Hospital PW understood the term "scope alignment" to mean

[10] FEMA's basis for rejecting the ADAMS Report is explained in Exhibit 1 at 23-36.

their joint effort to identify disaster-related damage and eligible scope of work. By agreement, they undertook this process and an appropriate methodology for identifying disaster-related damage. This process evolved from a recognition that FEMA's and the Applicant's preliminary cost estimates to repair disaster-related damage were far apart. Under 44 C.F.R. § 206.202(d), the Applicant is responsible for bringing disaster-related damage to FEMA's attention; however, the task for this facility was complex and FEMA endeavored to work with the Applicant and its consultant to identify damage. FEMA reminded participants that although the scope alignment requires joint effort, by law, the determinations of work and cost eligibility are FEMA's responsibility alone. See 42 U.S.C. § 5172(a) and (b).

By late February, 2006, FEMA specialists completed damage assessment of the entire hospital. As such, the inspectors submitted the first PWs identifying eligible repair of disaster-related damage. In mid-April 2006, FEMA completed the elevator assessment. See Exhibit 7, para. 17. Based on these assessments, FEMA approved five PWs for $23,175,177 to repair disaster-related damage to Charity Hospital.[11] Id.; see also Exhibit 12.

These initial PWs only documented disaster-related damage. Pre-disaster conditions were well-documented at Charity Hospital. See Exhibits 2 and 3. Years of neglect left the facility in such poor condition that the cause of some damage observed by the initial FEMA inspection team was uncertain. See Exhibit 7, para. 12. Given the Applicant's responsibility to identify damage,

[11] PW 2174 for $840,497 covered the estimate for the interior repairs of the upper floors (1- 20) of the Hospital. PW 2176 for $18,616,766 covered the repairs to the basement excluding the critical MEP and fire protection systems. PW 2175 for $1,465,717 covered the repair/replacement of the critical MEP and fire protection systems located in the basement of the Hospital. PW 2175v2 adds additional scope of work and costs for asset protection measures to stabilize the environment within the Charity Hospital and to suspend continuing damage and minimize the immediate vulnerability of the facility. FEMA obligated $3,171,508 in v2. PW 6090 for $126,396 covered the repairs to the hospital's laundry service tunnel. The scope of work covered repair/replacement of interior wall finishes and the electrical and mechanical systems. PW 10104 for $2,125,812 covered the repairs to the Hospital's elevators. The cost estimate reflects repairs resulting from flood damage to elevator pits, pit-mounted components and hoistway components located below the level of the floodwater. Repairs to some elevator cabs are also included.

FEMA inspectors documented only the damage that could be conclusively determined to be the result of the disaster. Id. The scope alignment process was intended to provide ample opportunity for the Applicant to present its damage findings to FEMA in accordance with 44 C.F.R. § 206.202(d)(1)(ii). In the aftermath of Hurricane Katrina, the primary goal of both FEMA and the Applicant was to document as much disaster-related damage as possible, determine eligible scope of work, and obligate funding for repairs as soon as possible.

Mold damage, for example, was observed during FEMA inspections. With the exception of the basement – where water and mold damage was pervasive, resulting in near total loss of architectural finishes and mechanical, electrical, and plumbing (MEP) – observed mold damage was fairly limited in the building. Without formal testing, it was not immediately obvious whether the observed mold damage was a pre-disaster condition or the result of the disaster. Leaky roofs, windows, and high humidity conditions resulted in extensive pre-disaster water and mold damage to the hospital. See Exhibit 2, pg. 1.1.2. Pre-disaster accounts noted many areas of the hospital with damaged wall finishes and ceiling tiles due to active HVAC and piping leaks. Id. at 1.1.3. Exterior water infiltration left conditions in the hospital so poor prior to Katrina that ADAMS noted toxic mold concerns raised by hospital staff during their site visits in 2002. Id. at 1.1.5. Thus, the isolated occurrences of apparent mold growth identified by FEMA inspectors on floors one through 20 could have been pre-existing.

On February 22, 2006, less than five months after the disaster, a FEMA mold specialist visited the facility to get an overview of mold conditions at the hospital.[12] See Exhibit 13. An Applicant representative escorted the FEMA mold specialist through various areas of the building, including the basement and between floors one and 16. Exhibit 14 at 1. The mold specialist

[12] The mold specialist is a Certified Industrial Hygienist and Certified Building Inspector. See Exhibit 13 at 6.

noted moist conditions, such as visible condensation on walls and other surfaces – indications of a non-functioning or ineffective HVAC system.[13] Id. Only localized instances of mold in areas where water intrusion occurred through windows were noted during this visit. Id. at 2. After the walkthrough with the Applicant escort, the mold specialist stated: "The applicant has not provided FEMA with any reports outlining type, locations and quantities of materials impacted by mold growth related to the disaster." Id.

The mold specialist returned to Charity Hospital for two, more extensive, site visits on June 21 and June 23, 2006. See Exhibit 15. An Applicant representative escorted the mold specialist through the building on these occasions as well. Id. at 1. The specialist noted that the HVAC systems appeared to be operating on some floors - a change from the February visit. Id. at 2. The FEMA team took relative humidity readings and found that conditions in most areas of the hospital were not conducive to mold growth. Id. at 2-3. Only localized mold was identified and the overall condition of the building finishes and furnishings appeared to be very similar to conditions observed in the previous visit. Id. at 3-4. Mold was noted on chairs in one room, but not observed on any other furnishings inspected throughout the building. Id. at 3. The specialist also noted instances of pre-existing mold conditions. Id. These observations led the mold specialist to conclude:

> "The suspect mold growth observed in the building, which is contributable to Hurricane Katrina, probably occurred within a few weeks following the disaster and then receded as water and water-impacted materials were removed from the building and inside temperatures and relative humidity decreased as outside conditions became cooler and less humid. Little additional growth has probably occurred to date.

[13] The specialist noted that the system appeared to be functioning in one area on the 7th floor. See Exhibit 14 at 1.

...

> If currently operating HVAC systems are maintained and additional HVAC units are brought back on line, it is unlikely that conditions will reoccur [sic] within the building that could support mold growth." Id. at 5.

It appeared to FEMA that the Applicant's early efforts to pump water from the basement, restore partial power to the building, and make temporary repairs to damaged windows and the roof, had stabilized Charity Hospital by June 2006. See Applicant Exhibit 8, pgs. 29-32.

The Applicant's Chronology of Asset Protection seems to suggest a pattern of routine inspections and minor repairs throughout most of 2006. In fact, the same description of work completed by MCLNO staff is copied for every entry from December 29, 2005, to September 5, 2006. Id. at 31-33. The Chronology's statements notwithstanding, on August 30, 2006, ADAMS supplemented its 2005 damage assessment with a new report and recommendations. See Exhibit 16. This supplemental report notes extensive unrepaired roof and mechanical equipment damage apparently missed by MCLNO staff on their bi-weekly inspections. No temporary repairs are described or documented, and the report recommends immediate replacement of the roof to facilitate "drying-out" of the building.[14] Id. at 10. The ADAMS supplemental report also emphasizes the need to clean and test HVAC ductwork to ensure compliance with applicable indoor air quality standards. Exhibit 16 at 16.

The 2006 ADAMS supplemental report suggests the "business as usual" routine described in the Applicant's Chronology of Asset Protection was in need of change. The

[14] ADAMS also recommended full replacement of the older portions of the hospital roof to stop ongoing leaks in 2002. Exhibit 2, pg. 1.1.2.

bi-weekly MCLNO staff inspections overlooked obvious vulnerabilities on the roof and opportunities to clean the HVAC ductwork. See Applicant Exhibit 8, pgs. 9-12.

IV. Scope Alignment Process with Blitch/Knevel and Associates ("BKA")

In August 2006, the Applicant contracted with BKA to perform an assessment of disaster-related damage to 23 MCLNO buildings (including the Charity Hospital Main Building) and develop a design package to repair and/or restore damaged areas to pre-disaster conditions. Applicant Exhibit 8 at 12. The Applicant's contract with BKA included scope alignment activities for the 23 MCLNO facilities. Id. Scope alignment for all 23 MCLNO facilities and other related matters were discussed at meetings between the Applicant, GOHSEP, BKA, and FEMA that began on September 15, 2006. Id. BKA initially projected that it would complete assessment and alignment activities for Charity Hospital in late 2007.[15] Exhibit 7, para. 18.

A. Assessment Methodology

FEMA discussed assessment methodologies and scope alignment procedures openly and continuously during meetings with BKA, GOHSEP, LSUHSD, and the Applicant. See Applicant Exhibit at 12-23. Public Assistance Program eligibility was an integral part of these discussions. FEMA emphasized that field validation of damage and supporting documentation would be required before FEMA could make a formal determination on eligibility. Id.; see also Exhibit 7, para. 20. FEMA also encouraged exploratory work and testing to document claimed damage to inaccessible building components or areas and noted the Public Assistance Program provisions for reimbursement of these costs.[16] Applicant Exhibit 8 at 20.

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[15] In early 2008, BKA began reporting the need for further scope alignment necessary after completion of the Secure and Ventilate Package. Exhibit 7, para. 23 The later projections targeted completion of scope alignment in late 2008/early 2009. Id.

[16] FEMA may pay for inspections to determine the extent of damage and method of repair to inaccessible structural components. See PA Guide, (FEMA 322 (1999) at 55-58.

FEMA, GOHSEP, Applicant, LSUHSD, and BKA personnel discussed prior scope alignment experience and FEMA advised BKA of successful methods used by other architectural/engineering (A/E) firms on separate Applicant projects. Id. at 13. BKA requested - and FEMA provided - a sample of previous formats used to document damage and scope of work. Exhibit 7, para. 20. Subsequently, FEMA and BKA mutually agreed to a room-by-room format for Charity Hospital. Applicant Exhibit 8 at 17 and 19-20. BKA also used this format on all other MCLNO facilities. Id. BKA, the Applicant, and GOHSEP understood that FEMA eligibility determinations would be based on submissions of "workbooks" that reported damage on a room-by-room basis. Exhibit 7, para. 21. These discussions are reflected in the Applicant's Chronology of Asset Protection. See Applicant Exhibit 8 at 12-23. In all, BKA submitted 22 workbooks to FEMA that reported damage and scope of work for the entire hospital on a room-by-room basis. FEMA received the first workbook on July 27, 2007, and the last on March 20, 2008. See Exhibit 7, para. 21. An example of a workbook cover page and data as submitted to FEMA is attached as Exhibit 17.

Following the start of scope alignment, the Applicant's Chronology of Asset Protection tracks two separate courses of Applicant-FEMA interaction: (1) ongoing scope alignment related to permanent repairs; and (2) discussions about asset protection to limit or prevent post-disaster damage. See Applicant Exhibit 8 at 12-23.

1. Validation of BKA Damage Assessment and Permanent Repair Estimates

FEMA informed the Applicant and BKA early in the process that the Agency would pursue a sampling approach to facilitate the scope alignment. FEMA agreed to review BKA scope alignment workbooks, sample line items contained therein, and conduct follow up site visits to validate the claims. If the sampling approach indicated a pattern of disaster-related damage and

eligible scope of work, then FEMA would consider accepting the entire claim as representing disaster-related damage and eligible scope. If the sampling approach produced patterns of errors or inclusion of ineligible work, FEMA would then inform the Applicant that a more thorough validation of the claim would be required. FEMA proposed this sampling approach in an attempt to facilitate recovery, but success depended on verification that damage reported by BKA was disaster-related. Exhibit 7, para. 22.

Upon receipt of BKA assessment workbooks, FEMA conducted an internal review and sampled line items for validation in accordance with the agreed upon procedure described in the previous paragraph. In each sampled case, FEMA identified major issues and concerns that suggested an overall pattern of error and inclusion of ineligible work. See Exhibit 7, para. 23. FEMA identified more than 200 specific instances where the BKA workbooks included ineligible work, damage that could not be verified, avoidable post-disaster damage, and undocumented assumptions. Id. Specifically, FEMA notified the Applicant and BKA of the following:

- Based on observations in the field and documents received to date, FEMA Health and Research Team (H&R) is unable to determine the extent of damage and subsequent scope. Recommendation pending receipt of supporting documentation (e.g., testing, exploratory work, product literature): **149 specific findings**
- FEMA H&R was unable to verify damage in the field: **73 specific findings**
- Based on observations in the field and insufficient amount of supporting documentation, FEMA H&R is presently unable to determine if damage is storm related: **51 specific findings**
- FEMA H&R has determined work to be ineligible: **33 specific findings**

- Based on observations in the field and supporting documentation received, FEMA H&R determined that damage resulted from a lack of environmental control within the building after the event: **9 specific findings**

A sample of these findings provided to the Applicant and BKA is included in Exhibit 18. It is important to note that FEMA provided several hundred additional comments and notes to the Applicant and BKA regarding other discrepancies found during the 18-month validation process. See Exhibit 19. For example, dimensions used by BKA to calculate damage and scope quantities were frequently at variance with FEMA dimensions. See Exhibit 20. FEMA withheld making formal findings related to damage cause or scope of work when there were outstanding questions about something as basic as facility dimensions. Exhibit 7, para 24.

FEMA continued to work with the Applicant and BKA in an attempt to resolve these inconsistencies. FEMA wanted to make sure the Applicant had ample opportunity to provide necessary clarification before making a determination that would detrimentally impact their claim. These hundreds of examples resulted from review of a small sample of BKA's 22 scope alignment workbooks that cover the entire hospital. The sample indicates pervasive inclusion of ineligible work, unverified damage, avoidable post-disaster damage, and undocumented assumptions throughout BKA's 22 damage assessment workbooks. Id.

FEMA shared these major issues and concerns with BKA and the Applicant during regular meetings resulting in specific requests for supporting documentation and identification of apparent pre-disaster damage and deferred maintenance, items conflicting with actual field conditions, inconsistencies and an assortment of other irregularities such as duplications. FEMA also identified apparent omissions such as missing damage that FEMA observed during its field validation. Exhibit 7, para. 25.

2. Asset Protection to Prevent Post-Disaster Damage

From September 2006 to February 2007, scope alignment of permanent repair work was the primary focus of FEMA and the Applicant. See Applicant Exhibit 8 at 12-23. During this time, FEMA inspectors noticed conditions worsening at the hospital due to apparent lapses in asset protection. Exhibit 7, para. 26. The Applicant's Chronology of Asset Protection ("Chronology") does not reference any specific action taken to protect the hospital from further damage during this time period. See Applicant Exhibit 8 at 12-23. Noticeably absent from the Chronology is any reference to roof repairs or HVAC duct cleaning recommended by ADAMS six months earlier. The first reference in the Chronology to specific asset protection issues is February 13, 2007. Id. at 23. BKA's notes from the February 13, 2007, meeting provide details that were omitted from the Chronology, which suggest that the "business as usual approach" documented in the Chronology since FEMA's June 2006 inspections was not effective:

- "Renny (Applicant Representative) said that several asset protection measures previously taken by MCLNO have not remained in place."
- "Renny (Applicant Representative) determined that asset protection should be provided to L&M Building and Charity Hospital Main Building. The scope of work for the asset protection will include roof repairs, boarding of windows and other temporary measures to maintain the building dry." Exhibit 21(A) at 2.

The Chronology clarifies that "[t]he temporary measures will not include energizing the buildings to maintain environmental or temperature controls within the structures." Applicant Exhibit 8 at 34.

From February 13, 2007, onward, asset protection was a regular topic of discussion at the bi-weekly scope alignment meetings. The Chronology and BKA generated meeting notes attest to this fact. See Applicant Exhibit 8 at 22-23; see also Exhibit 21.

On April 16, 2007, FEMA's Director of the Louisiana Transitional Office wrote a letter to GOHSEP explaining FEMA's concern that some applicants were failing to take reasonable and prudent measures to protect their facilities after Hurricane Katrina. The letter advised that "[i]t is imperative that the applicants are aware of the requirements related to protecting facilities from further deterioration and the implications of neglecting to do so." See Exhibit 22. This letter specifically mentions Charity Hospital as an example of FEMA's concern that the Applicant did not appear to be taking proper measures to adequately protect the hospital from further damage.

Although FEMA's letter did not specify the type of asset protection measures that should be implemented to protect Charity, the Applicant was certainly aware of the measures that it needed to take. On April 24, 2007, BKA submitted to the Applicant its proposal for design services related to the asset protection. The following list is a sample of the proposed asset protection measures to prevent further damage to the Charity Hospital:

- Remove water and moisture damaged soft materials.
- Provide and install passive and or active ventilation system for minimal air movement.
- Provide and install temporary measures to pump-out water from basements.
- Provide and install roof repairs to stop leaks from the roofs.
- Dry-out and dehumidify the buildings.

- Clean ducts and provide temporary HVAC.
- Bring temporary power to the buildings to assist in stabilizing the buildings.

Exhibit 21(C).

At the June 28, 2007, scope alignment meeting, BKA meeting notes reference FEMA's urging that asset protection measures "must commence without further delay." Exhibit 21(G) at 2.

In August 2007, GOHSEP responded to FEMA's April 2007 letter urging applicants to protect their assets. See Applicant Exhibit 20. GOHSEP explained that 18 months after Hurricane Katrina was not enough time for applicants to adequately protect its facilities from continuing damage. Id. Although not specific to Charity Hospital, GOHSEP's response does not comport with FEMA's observations in June 2006, which found the Applicant's efforts to stabilize the hospital proving successful at that time. See Exhibit 15.

In November 2007, the Applicant commissioned a roof inspection and condition survey. This survey reached the same conclusion as ADAMS a year earlier: The roof needed to be replaced. See Exhibit 23. BKA's November 29, 2007, meeting notes include extensive discussion about the scope of work related to asset protection and FEMA's concerns that the asset protection scope be kept separate from the ongoing scope alignment of earlier PWs. See Exhibit 21(I) at 2. An April 8, 2008, letter from BKA addressed to the Applicant states the following: "Until recently, we were not tasked to prepare bid documents to stabilize the buildings, namely the Charity Main Hospital…" Exhibit 21(J). This admission comes over 14 months after the Applicant acknowledged that its early temporary protective measures had not remained in place and that environmental controls would not be restored to the building. See Exhibit 21(A); see also Applicant Exhibit 8 at 22-23.

Only days before this BKA letter, FEMA prepared PW 2175v2 to capture the (finally defined) scope of asset protection work. See Exhibit 12(F). The PW obligates $3,171,508 and notes that the work is "not associated to the continuation of damages observed in the field. Any work related to damages that are considered preventable in nature are not recommended as eligible." Id. Due to the Applicant's failure to take swift action and protect Charity Hospital, damage to the facility mounted. FEMA took care to note in this PW that any avoidable post-disaster damage that occurred as a result of the Applicant's failure to protect the facility would be ineligible consistent with law. 44 C.F.R. § 206.223(e). The PW served as notice of FEMA's intent to review all damage to the facility presented by BKA during the ongoing scope alignment to identify cause and determine eligibility.[17]

Shortly after issuing PW 2175v2, FEMA's Director of the Louisiana Transitional Recovery Office (TRO) wrote a second letter to GOHSEP on May 5, 2008, which stated that "over a year since my first letter and nearing three [years] since the storm event, it is alarming that applicants continue to allow their buildings to deteriorate." Exhibit 25. FEMA mentioned Charity Hospital in this second letter and warned that funding for repair of avoidable damage would not be eligible pursuant to 44 C.F.R. § 206.223(e).

B. Applicant Halts Scope Alignment Process

In April 2008, the Applicant informed FEMA of its intention to suspend the scope alignment process, so that BKA could assemble its data for submission of a claim. The Applicant's reasons for this action were unclear. FEMA had identified additional storm damage and associated

[17] The Applicant did not notify FEMA of its completion of the asset protective measures first recognized as necessary in February 2007 until more than two years later, on May 25, 2009. See Exhibit 24.

eligible repair scope of work and costs through the scope alignment process when the Applicant decided to end the collaborative effort. Exhibit 7, para. 28.

C. Applicant Submits Request for Replacement Hospital

On July 8, 2008, FEMA received the Applicant's claim for the replacement of Charity Hospital at a cost of $491,880,000. The Applicant's claim references a 2,000-plus-page document prepared by BKA in support of its conclusion that the cost to repair disaster-related damage exceeds 50 percent of the hospital's estimated replacement cost. This document is referenced hereafter as the "BKA Report." Applicant Exhibit 14; see Exhibit 7, para. 29.

The BKA Report represented a significant departure from the room-by-room approach that FEMA, the Applicant, and State agreed to and followed for 18 months during scope alignment. Moreover the BKA Report contained ineligible and inflated estimates of damage.

First, the BKA Report aggregated data by "zone" or a subdivision of each floor.[18] At no time prior to this submission did FEMA agree to this zone-by-zone aggregation of data. At this time, it was clear that the Applicant understood the agreed upon room-by-room format, as BKA had already submitted 22 workbooks of damage assessments and scope of work that covered the entire building in such a format. See Exhibit 7, para.27. The Applicant's Chronology refers to multiple instances where FEMA requested damage data by room. See Applicant Exhibit 8 at12-22. For example, the entry dated November 14, 2006 states: "FEMA stated that cause of damage recorded for each room must be explained to ensure that the cause is related to the storm … FEMA explained that the quantities derived on the worksheets need to be verifiable on the work

[18] The BKA Report divides each floor into zones or modules to describe and report damage and repair costs. Each zone or module includes a number of rooms, walkways, closets, and space used for other purposes. The upper floors (15-20) are reported as a single zone and therefore damage and scope quantities are summarized for the entire floor.

sheets and the location of the damage clearly indicated on the damage mapping plans." Id. at 19. Further, as agreed to with the Applicant and BKA, FEMA had relied on these earlier workbooks to document findings related to cause of damage, eligibility and ineligibility of work scope, and other requests for further information related to claimed damage and scope.[19] Id. at 19-20.

Second, FEMA could not verify that the BKA Report accounted for any of FEMA's prior findings.

Third, the BKA Report included non-damaged elements and associated ineligible scopes of work and costs.[20]

FEMA met with the Applicant soon after receipt of the claim to discuss its concerns with the BKA Report format. At this meeting, the Applicant requested that FEMA process the claim as submitted and stated that it would not provide any additional information for scope alignment. See Exhibit 7, para. 29.

V. FEMA Prepares PW 2175v3

In response to the Applicant's request to process their claim with no further scope alignment or validation of damage and scope, FEMA prepared PW 2175v3 for $126,142,709. PW 2715v3 consolidates all building damage, scope of work, and costs previously obligated for Charity Hospital under PWs 2174, 2175, 2176, 6090 and 10104 (total $26,346,696).

[19]See the list for some of the many specific findings made using the room-by-room workbooks in Exhibit 18.
[20]The BKA Report relies on an incorrect interpretation of FEMA Response and Recovery Directorate Disaster Assistance Policy 9524.4 (1998) and applies the 50 Percent Rule to damaged components. When applied in accordance with FEMA policy, the 50 Percent Rule is applied to facilities and not facility components. A more detailed analysis of this issue is included in Exhibit 1.

In addition to the consolidation of these earlier PWs, PW 2175v3 includes $35,683,176 for additional disaster-related damage and eligible scope of work identified through scope alignment and an estimate of concealed damage. FEMA derived this additional scope of work and cost from data gathered up to the point in time when the Applicant unilaterally withdrew from the scope alignment process. Confirmation of concealed damage requires destructive testing that is the responsibility of the owner of the property to authorize and initiate.[21] FEMA encouraged the Applicant to perform such testing during scope alignment; however, no testing results were provided. Consequently, FEMA did not have benefit of documentation that identified the location, nature, and extent of specific quantities of this concealed disaster-related damage. In an effort to facilitate recovery, FEMA took a leadership role and its engineers estimated the extent of disaster-related concealed damage and related costs based on the type and extent of observed disaster-related damage. Exhibit 7, para. 30.

In addition, FEMA included funding for unavoidable post-disaster damage. Mold and other environmental damage require specific testing to identify extent of damage and facilitate determination of cause and approximate date of establishment. The Applicant failed to provide this documentation and withdrew from the scope alignment process thereby providing FEMA with few options. Without testing results, FEMA could not conclusively determine how much mold and other environmental damage occurred prior to the disaster, as a result of the disaster, as unavoidable post-disaster damage, or as a result of Applicant negligence. Therefore, FEMA included an estimate to repair a portion of this post-disaster damage in PW 2175v3 in an effort to facilitate recovery. FEMA did not develop this estimate based on specific items of work. Rather, FEMA used a deductive methodology based on all available data at the time of PW 2175v3 completion, including the 2002, 2003, 2005, and 2006 ADAMS reports, initial FEMA

[21] FEMA and BKA encouraged the Applicant to conduct testing required to document claimed damage and FEMA discussed eligibility of reimbursement of related costs. Applicant Exhibit 8 at 20.

site visits, data gathered through the scope alignment process, and knowledge drawn from the combined experience of the technical specialists assigned to the FEMA Louisiana Transitional Recovery Office (LA-TRO) Health & Research (H&R) team. Exhibit 7, para. 31.

VI. Procedural History

A. First Appeal

On March 11, 2009, the Applicant appealed FEMA's determination and PW 2174v3. The Applicant did not agree with FEMA's estimated reimbursement for repairs, and requested that FEMA prepare a new PW to include what it determined to be the total disaster-related damage to the facility. The Applicant submitted repair analyses and estimates from three source studies - ADAMS, BKA and R.S. MEANS (RS Means).[22] Specifically, the Applicant requested that FEMA accept the BKA assessment and concur that its calculation of repair cost exceeds 50 percent of replacement cost and that FEMA provide funding for a replacement hospital at a cost of $491,884,000. See Applicant Exhibit 35.

On May 8, 2009, the Acting Regional Administrator denied the first appeal because:

- The Applicant's claim is inconsistent with FEMA estimating practices and the 2008 BKA Report incorrectly applies the 50 percent Rule resulting in the inclusion of repairs to non-damaged building components and inflated repair costs.
- The Applicant's claim does not account for the extensively documented pre-disaster damage and deferred maintenance issues and includes ineligible post-disaster damage.
- The November 2005 ADAMS Report data represented a more logical estimate of disaster-related damage than the BKA Report, even though the ADAMS report presented data in summary form and therefore was unsuitable for use as the basis for preparing a PW.

[22] FEMA's basis for rejecting all three estimates is detailed in Exhibit X.

- Per the November 2005 ADAMS Report, the repair of damage caused by the disaster, excluding unspecified and undocumented code upgrades, was less than 50 percent of replacement costs. Exclusion of triggered code upgrades is required when performing the 50 Percent Rule calculation per FEMA Response and Recovery Directorate Policy 9524.4 (1998).
- The PW 2175v3 repair estimate for Charity Hospital consolidates all FEMA determined disaster-related building damage and eligible scope of work. FEMA's estimate of repair cost is less than 50 percent of estimated replacement cost; therefore, replacement of Charity Hospital is not eligible.

Given these findings, FEMA Region VI denied the Applicant's first appeal and concluded that replacement of Charity Hospital is not eligible pursuant to 44 C.F.R. § 206.226(f). See Applicant Exhibit 27.

B. Second Appeal

The Applicant submitted its second appeal to GOHSEP on July 2, 2009. The Applicant claims that FEMA acted arbitrarily and capriciously in the development and obligation of PW 2175v3. The Applicant maintains that it is entitled to the full replacement cost for Charity Hospital because several highly qualified and independent architectural, engineering, and estimating firms have concluded that damage to the facility exceeds 50 percent of replacement costs pursuant to 44 C.F.R. § 206.226(f). On August 26, 2009, GOHSEP submitted the second appeal to FEMA with a recommendation that, "FEMA take no action on the appeal request until they [Applicant] can determine if they want to submit a request for arbitration in lieu of the second appeal." See Exhibit 26.

C. Applicant's Request for Arbitration

The Applicant thereafter filed its request for arbitration dated September 30, 2009. On October 14, 2009, GOHSEP submitted a letter in support of the Applicant's arbitration request.[23]

[23] FEMA notes that GOHSEP's letter in support of the Applicant's request references other PWs in an attempt to demonstrate that FEMA has consistently underestimated disaster-related damage estimates for other disaster damaged facilities. These other PWs are irrelevant because they are not subject to this arbitration, and should not be considered by the Panel. Still, FEMA's analysis of these PWs reveals that disaster-related damage estimates were in fact accurate. Furthermore, GOHSEP also asserts that Charity Hospital is not repairable; yet no documentation is provided to support this notion, and this assertion is in fact contrary to the findings of an expert report in regard to Charity Hospital prepared at the request of the Louisiana legislature in 2006. See Exhibit 27; see also Exhibit 5.

ARGUMENT

I. FEMA's Preparation of PW 2175v3 is Reasonable and Should Be Afforded Deference.

FEMA maintains that the eligible scope of work and costs to repair Charity Hospital outlined in PW 2175v3 are appropriate, fair and reasonable, and determined in accordance with applicable law and policy. Accordingly, FEMA asserts this Panel must defer to the Agency's determination that $126,142,709 is appropriate for eligible repair costs. Also, FEMA maintains that its estimate of $474,750,898 in eligible replacement costs for the facility is appropriate, fair and reasonable, and determined in accordance with applicable law and policy. In comparison, the Applicant's technical reports in regard to the facility improperly estimate both the eligible repair and replacement costs. See Exhibit 1.

First, PW2175v3 consolidates eligible scope of work from earlier PWs prepared for Charity Hospital. FEMA sent a team of highly qualified technical specialists to prepare initial assessments and began inspections immediately. FEMA then conducted an 18-month long collaboration with the Applicant and its consultant, BKA, during its scope alignment process. Following the Applicant's refusal to continue with the scope alignment process, FEMA included an estimate for repair of additional damage presented by the Applicant and determined by FEMA to be disaster-related.

Second, the PW also includes cost allowances to repair concealed disaster-related damage that FEMA did not observe during its initial assessments or during scope alignment. Concealed damage can only be confirmed and attributed to the disaster with destructive testing and other methods that can only be approved and executed by the Applicant as building owner. FEMA

repeatedly encouraged that the State carry out such testing to document its claim of disaster-related damage; however, no testing is known to have occurred. The Applicant's unilateral withdrawal from the collaborative scope alignment process precluded FEMA from obtaining documentation to identify specific quantities of this concealed damage. In an effort to facilitate recovery, FEMA took a leadership role and estimated the damage and associated scope of work and cost for the PW.

Third, additional funding is included in the PW to repair damage that FEMA reasonably estimated occurred after the disaster, and that the Applicant may not have been able to avoid. The extent and origin of environmental damage such as mold contamination can only be established through testing. The Applicant failed to provide any documentation that would demonstrate whether mold and other post-storm environmental contamination was a result of the disaster. Without testing results, FEMA could not conclusively determine how this damage occurred after the disaster and what portion of the post-storm damage was more directly attributable to Applicant negligence. FEMA's estimate of unavoidable post-disaster damage was informed by all available data, including the 2002, 2003, 2005 and 2006 ADAMS reports, initial FEMA site visits, data gathered through the scope alignment process, and knowledge drawn from the combined experience of the FEMA technical specialists assigned to assist the Applicant. Although the Applicant had the responsibility to demonstrate that all of the damage is disaster-related and not the result of negligence – and chose not to do so by withdrawing from the scope alignment process - FEMA again took a leadership role by using all available resources to reasonably estimate a level of post-disaster damage consistent with the Stafford Act.

Based on the statutory scheme and regulations FEMA has been entrusted to administer, PW 2175v3 represents a fair and reasonable estimate of the cost to repair disaster-related damage to

Charity Hospital. FEMA's use of its discretion to determine the eligible amount obligated in PW 2175v3 was valid, appropriate and entitled to deference.

II. The Applicant's Analysis Does Not Demonstrate that FEMA was Arbitrary and Capricious and it Does Not Satisfy Requirements of the Stafford Act.

By law, FEMA has sole responsibility for determining eligible scope of work and cost. See 42 U.S.C. § 5172(a) and (b). Given this responsibility, FEMA developed guidelines for field staff to follow when reviewing applicant estimates that are based on an A/E report. Consistent with law, the first step in this review process is verification that "all items of work included in the estimate are eligible." Applicant Exhibit 5 at 27. If FEMA cannot verify the eligibility of the scope of work, the estimate must not be used as the basis for obligating funds. Id. at 19.

On July 8, 2008, the Applicant submitted its claim, which is based on the BKA Report repair and replacement estimates. FEMA reviewed all submitted material and informed the Applicant shortly after submittal that it could not verify all scope of work within the BKA Report and, in fact, FEMA had reason to believe the estimate includes ineligible work. In response, the Applicant asked that FEMA process its claim with the stipulation that no further scope alignment or additional information would be provided. The Applicant's unreasonable demand left FEMA with no choice but to reject the claim in its entirety. See Exhibit 7, paras. 27-29.

As described below, FEMA rejected the estimate based on the BKA Report because BKA: (1) incorrectly applied the 50 Percent Rule to building components; (2) included cost to repair building components not damaged by Hurricane Katrina; and (3) did not provide an estimate that is comparable to RS Means cost data.

A. BKA Incorrectly Applied of The 50 Percent Rule to Building Components

The BKA Report includes repair to surfaces, elements, building components, stairwell ceilings, doors and windows that were not damaged by the disaster. Inclusion of this scope of work is the result of BKA's misapplication of the 50 Percent Rule. Where BKA determined that the disaster damaged more than 50 Percent of a building component, the repair estimate scope of work includes repair or replacement of the entire building component. See Applicant Exhibit 14 at 1 (Methodology, Architectural Items 1, 2, 3 and 8). BKA's application of the 50 percent Rule is not consistent with FEMA policy. The 50 Percent Rule is applied to an entire facility, not components of a facility. See Applicant Exhibits 41 and 42.

As a result of BKA's incorrect application of the 50 Percent Rule to building components, the Applicant's estimate includes ineligible work and cost associated with facility components not damaged by the disaster. See 44 C.F.R. § 206.226. One example (among many) relates to misapplication of the 50 Percent Rule to windows and doors in a zone (i.e., subdivision of space on each floor). The BKA estimate includes the cost to replace all windows or doors in a zone even if it determined that the disaster did not damage all windows or doors in that zone.[24] See Applicant Exhibit 14, Methodology, Architectural Item #8 at 1.

The BKA Report's inclusion of repair cost for undamaged building components further inflates the Applicant's claim by also including the cost associated with incidental work and environmental remediation.

[24] The BKA Report fails completely to describe efforts to distinguish between pre-disaster and disaster conditions. ADAMS identified the need to replace all exterior windows in the facility prior to the disaster. "The windows are badly rusted. In some instances, physical objects can be thrust completely through the frame sections due to extensive corrosion. The windows are so leaky and damaged that the HVAC system cannot possibly function, even according to the currently low technology design. The climate of the area precludes a solution to the interior finish issues in the absence of a complete window replacement." Exhibit 2 at 1.1.2. Also, the ADAMS repair estimate for pre-disaster damage and deferred maintenance ($134.5 million) plus the BKA repair estimate for allegedly only disaster-related damage ($280.5 million) is approximately $40 million higher than the BKA replacement estimate ($375.3 million). The claim that BKA included only disaster-related damage is suspect; at a minimum, BKA should have explained how pre-disaster damage and deferred maintenance was distinguished from disaster-related damage.

The BKA Report also assumes incidental replacement of plumbing, electrical, telephone, and data outlets that correlate to removal of walls. Id., Engineering Item #6 at 2. FEMA agrees that replacement of some plumbing, electrical, telephone, and data outlets may be eligible with wall repair or replacement work; however, eligibility is limited to repair or replacement of components to which damage cannot be reasonably avoided in the process of repairing or replacing wall area damaged by the disaster. Since the BKA Report assumes replacement of entire walls (even though in many instances the disaster did not damage the entire wall), the repair estimate reflects the ineligible cost associated with incidental repairs to plumbing, electrical, telephone, and data outlets correlated with undamaged wall surface area. Id., Cost Estimate Item #1 at 2.

Similarly, the repair estimate reflects the cost of incidental environmental remediation work. BKA assumes near ubiquitous presence of lead based paint (LBP) on walls and asbestos containing material (ACM) in ceilings, tiles, and interstitial space. Id. at 1 (Architectural Items #11 and 12); Id. (Engineering Items #9 and 10). The BKA Report also assumes the need to abate environmental hazards associated with renovation and incidental demolition work, including LBP and ACM abatement. Id. FEMA agrees that LBP and ACM abatement work associated with repair of walls, ceilings, and interstitial spaces may be eligible; however, eligibility is limited to abatement work that is directly and necessarily associated with the repair of disaster-related damage. By way of its misapplication of the 50 Percent Rule, the BKA Report includes renovation and demolition of wall, floor, and ceiling surfaces not damaged by the disaster. Its estimate also includes the cost of environmental remediation work associated with wall, floor, and ceiling surfaces not actually damaged by the disaster.

The BKA Report's inclusion of ineligible work is sufficient grounds to reject the entire claim as any "eligibility conflicts involving scope of work items must be resolved before the CEF is prepared." Applicant Exhibit at 19.

B. BKA Included the Cost to Repair Building Components Not Damaged by Hurricane Katrina

FEMA's rejection of the claim was not based entirely on the Applicant's refusal to facilitate the Agency's validation of claimed scope of work. FEMA had good reason to suspect that the BKA Report included a substantial amount of non-disaster damage. Extensive pre-disaster and post-disaster neglect resulted in extensive damage to Charity Hospital unrelated to Hurricane Katrina.

Charity Hospital was in a state of disrepair from years of neglect at the time of the disaster. ADAMS documented extensive pre-disaster damage and deferred maintenance issues at Charity Hospital in 2002 that led it to conclude that the cost of repairs would exceed 50 percent of the cost to replace the hospital. Exhibit 2 at 1.2.2. In 2003, ADAMS concluded that the Charity Campus (including the Charity Hospital Main Building) was "no longer suited for healthcare services delivery." Exhibit 3 at 1.1.

The 2002 and 2003 ADAMS reports conflict with BKA Report findings. For example, the BKA Report attributed the need to replace the HVAC system to the disaster. Applicant Exhibit 14, Methodology, Engineering Items #1 and 2 at 1. However, ADAMS (2003) noted the need to replace the system prior to the disaster: "The HVAC system in the facility is overall dysfunctional and requires a complete replacement." Exhibit 3 at 1.2.

The BKA Report also claims that replacement of the potable water piping is the result of the disaster. Applicant Exhibit 14, Methodology, Engineering Item #4 at 2 But ADAMS (2002)

identified replacement of "water supply and drain systems" as necessary prior to the disaster. Exhibit 2 at 1.1.11.

The BKA Report claims the need for extensive environmental remediation of asbestos, mold, lead based paint, and other environmental contaminants that threaten public health despite having not provided testing results or other documentation that demonstrates this work is required as a result of the disaster. Applicant Exhibit 14, Environmental Conditions at 1-3. Yet, ADAMS (2002) highlights extensive environmental remediation needs throughout the building and, specifically notes that "Indoor air quality and the growth of mold is a major issue…" See Exhibit 2 at 1.1.7.

The BKA Report included unverified scope of work, which is sufficient grounds to reject the entire claim as any "eligibility conflicts involving scope of work items must be resolved before the CEF is prepared." Applicant Exhibit 5 at 19.

C. The Applicant's Estimate Is Not Comparable to RS Means Cost Data

FEMA has sole responsibility to determine eligible repair costs when repair work is incomplete. See 42 U.S.C. § 5172(e)(1)(A). FEMA implements this requirement of law by following the established procedure for reviewing applicant estimates based on an A/E report. Applicant Exhibit 5 at 27. Steps two through four of this procedure require FEMA field personnel to compare cost data used in an applicant's estimate to RS Means cost data or another local cost data source to determine whether the estimate is reasonable and appropriate for the scope of work.[25] If FEMA determines that the applicant estimate cost data is not comparable to RS Means cost data or another local cost data source, then the estimate was not prepared using

[25] Comparability with RS Means cost data (the estimating resource) is not to be confused with the estimate prepared for the Applicant by RS Means (the company).

verifiable cost estimating methodology and therefore cannot be used as the basis for CEF or in a PW for obligating funds. Id.

The BKA Report estimate was not prepared using appropriate cost estimating methodology and is not comparable to RS Means cost data or any other documented local cost data source. See Exhibit 1 at 4-17. Specifically:

- The estimate uses the RS Means title line code #13 000 000 000 for environmental cleaning of the basement ($1,427,124); however, RS Means does not list a unit cost for this line code. Therefore, the BKA Report either customized unit prices for some items or the estimator was unfamiliar with the appropriate way to label the unit prices. In any case, FEMA cannot verify the appropriateness of these unit prices independently.
- A single RS Means cost code is used for multiple line items with a different unit cost for each line item. For example, each floor above the basement uses the Project Cost line code (171 460 2720) for two different scopes of work: removal and replacement of plumbing fixtures and piping, and sprinkler cleaning and repair, with a different unit price for each scope of work. Either the source data was corrupted or the BKA estimators customized unit prices. In any case, FEMA cannot verify the appropriateness of these unit prices independently.
- Approximately 60 percent of the BKA Report's base cost utilized RS Means "Project Cost" Division 17 data. Project Cost data is intended for planning purposes only, and not for analysis. Unlike all other RS Means unit cost data, the scope of work included in the unit cost is not defined in the Project Cost data. The lack of a defined scope of work included in the unit cost results in data being so "soft" that the component costs do not add-up to the total cost. FEMA cannot verify the appropriateness of Project Cost data independently.

- Several areas of work are estimated as lump sum line items without descriptive scope or quantity of work required. The areas include stairwells, vertical chases, west pavilion, exterior skin, roofing repair and elevator. FEMA cannot verify the appropriateness of lump sum scope of work items without quantities and unit costs. Use of lump sum items in a base cost estimate is prohibited. Id.

The BKA Report's use of incorrect cost estimating methodology is sufficient to justify rejection of the entire claim as it cannot be determined whether the estimate is comparable to RS Means pursuant to the established procedure for reviewing applicant-submitted estimates based on an A/E report. Applicant Exhibit 5 at 27.

As demonstrated, rejection of the BKA Report as the basis for obligating Public Assistance funding is not only entirely appropriate, it is required. Furthermore, the BKA Report cannot be used as the basis for computing the 50 Percent Rule to determine whether replacement of Charity Hospital is eligible. Therefore, FEMA's rejection of the Applicant's claim, in its entirety, was reasonable and appropriate. While the Applicant may disagree with FEMA's methodology for determining an eligible scope of work, its own analysis fails to meet the requirements of the Stafford Act and its implementing regulations. The Applicant's deeply flawed analysis does not demonstrate that FEMA acted in an arbitrary and capricious manner, nor does it provide a legally sufficient alternative.